UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARIO CHACON HERNANDEZ,

Petitioner,

v.

VICTOR M. ALMAGER, Warden,

Respondent.

No. CV 06-7519-JFW (AGR)

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the magistrate judge's Report and Recommendation. The Court agrees with the recommendation of the magistrate judge.

IT IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: 1/29/08

JOHN F. WALTER
UNITED STATES DISTRICT JUDGE

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CENTRAL DISTRICT OF CALIFORNIA

MARIO CHACON HERNANDEZ,

Petitioner,

v.

VICTOR M. ALMAGER, Warden,

Respondent.

NO. CV 06-7519-JFW (AGR)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable John F. Walter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends the Petition for Writ of Habeas Corpus be denied.

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I.

SUMMARY OF PROCEEDINGS

On February 15, 2005, a Los Angeles County Superior Court jury convicted Petitioner of second-degree murder. (Answer at 1.) On May 18, 2005, the court sentenced Petitioner to 15 years to life. (First Amended Petition ("Petition") at 2.) On May 16, 2006, the California Court of Appeal affirmed Petitioner's conviction. (Lodged Document ("LD") 4.) On August 16, 2006, the California Supreme Court denied review without explanation. (LD 6.)

On March 19, 2007, pursuant to 28 U.S.C. § 2254, Petitioner filed a First Amended Petition for Writ of Habeas Corpus by a Person in State Custody in this Court in which he raised the following numbered grounds: (1, 2, 3, & 5) instructional error, (4) *Miranda* and ineffective assistance of counsel, and (6) prosecutorial misconduct in closing argument. (Petition at 5-7.[1])

Respondent filed an answer on June 8, 2007. Petitioner filed a Reply on October 19, 2007. This matter was taken under submission and is now ready for decision.

II.

STATEMENT OF FACTS

Below are the facts set forth in the California Court of Appeal decision on direct review. To the extent an evaluation of Petitioner's claims for relief depends on an examination of the record, the Court has made an independent evaluation of the record specific to Petitioner's claims for relief.

1. Events Prior to the Killing of Gabrielle on February 23 or 24, 2004

Defendant went to El Salvador in December 2003. Defendant returned to

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[1] The petition is missing page numbers. For ease of reference, the Court has marked the face page as page 1, the subsequent form pages in ascending sequence, the attached Ground Six page as page 7, and the continuation of the form after the attached pages as page 8. The Court has left intact Petitioner's pagination of the attached Ground Four Supporting Facts pages.

the United States on January 16, 2004, only to find that Gabrielle and their daughter, Gabriela, had moved to a different apartment without telling him. Late in January, Gabriela had a conversation with defendant in which defendant asked if his wife was going to reconcile with him. Gabriela told defendant that Gabrielle was not going back to him. Defendant said, "Should I kill you, kill your sister, kill your mom and then kill myself?"During the week prior to February 24, Gabriela heard defendant leave telephone messages threatening her mother.

2. Events on the Night of the Killing

Gabriela spoke to her mother on the phone at 8:30 p.m. on February 23. Gabrielle was at Bally's Total Fitness with defendant and told Gabriela she would be home soon. Gabriela called defendant's cell phone at 10:00 that evening. Defendant answered but did not speak to her. Gabriela could hear a conversation in the background in which defendant was answering questions pertaining to the whereabouts of his family.

Deputy Gerhard Ogurek was on patrol on February 23, investigating a person walking on the side of the road. A van driven by defendant from the direction of Big Tujunga Canyon Road passed Deputy Ogurek and crashed into some boulders at a curve in the road, leaving the van too badly damaged to drive. As Deputy Ogurek spoke to defendant, he noticed that defendant was trying to push items in the center of the van toward the rear compartment. Defendant said he was coming home from work in Los Angeles and that he lived in Los Angeles, which made no sense to Deputy Ogurek, since defendant was driving down from the mountains. When pressed for an explanation, defendant said he was just looking at the mountains. Paramedics transported defendant to the hospital. Defendant made no mention of a crime having occurred. Deputy Ogurek later learned

Gabrielle's body was recovered about one mile from Camp Ybarra, which was about five miles from the scene of the collision. Defendant, who was a Pentecostal minister, was familiar with Camp Ybarra, which was used as a Christian camp.

Gabriela called defendant's cell phone at 1:30 a.m. on February 24. Defendant said he had dropped off Gabrielle but did not disclose the location. When Gabriela told defendant she was going to the police station, defendant said he hated her and called her a parasite. Gabriela went to the 77th Division of the Los Angeles Police Department at 2 a.m. on February 24, because she believed her father was involved with killing her mother. Officer Julia Peat was working the front desk at the 77th Division Station. Gabriela told Officer Peat that her mother and father had gone to the Bally's Total Fitness and her mother had not come home.

After Officer Peat had a five-minute conversation with Gabriela, defendant walked into the station. Defendant told Officer Peat he wanted to speak to her, so they moved away from the desk so that Gabriela could not hear their conversation. Defendant said something very bad happened to his wife. Defendant said "a Black man killed his wife and he dumped her in Tujunga Canyon. "Officer Peat interrupted the conversation and spoke to her supervisor, who directed that two Spanish-speaking officers question defendant.

Defendant was then questioned in the interview room of the detective area at 77th Division Station. Defendant was advised of his Miranda rights before the interview, which he waived. Defendant said he was with his wife at the Bally's Total Fitness near Crenshaw and Century. As they were leaving the gym, two male Blacks approached and forced them into the rear compartment of their van. One of the attackers drove, while the second assailant was with Gabrielle. Defendant was ordered not to look up,

although at one point he saw one of the men removing Gabrielle's clothing. The van eventually stopped at the Sunland offramp of the 210 Freeway, and the two male Blacks left the scene.

Defendant told the officers that once the attackers were gone, defendant looked up and saw his wife lying unclothed, with a rope around her neck. Defendant said he was shocked, confused, and unsure of what to do. Defendant said he drove into the Angeles National Forest and threw his wife's body off the side of the road. Defendant directed the officers to a location in the Angeles National Forest, where Gabrielle's lifeless body was located about four to five feet off an embankment. Defendant said the rope he had seen around his wife's neck was still in the van. Defendant told the officers that he collided with a rock as he was driving away.

The homicide investigation was handled by Sergeant Shannon Laren of the Los Angeles County Sheriff's Department and his partner, Sergeant Shaun McCarthy. Sergeant Laren responded to the location of 4100 Big Tujunga Canyon Road where he saw Gabrielle's body. He saw blood on her face, hands, and neck, and ligature marks on her neck.

Sergeants Laren and McCarthy saw skid marks on the pavement from Big Tujunga Canyon Road to Oro Vista, and some very large boulders that had been displaced. Defendant's van was no longer at the scene of the accident. The van was later examined in a tow lot, pursuant to a search warrant, and a rope was recovered from the floorboard.

Sergeant Laren conducted a videotaped interview of defendant at 11:00 p.m. on February 24, at the Crescenta Valley Station. Deputy Martha Guerrero acted as a Spanish language translator for defendant in the interview. Before the interview, defendant was advised of his Miranda rights. It was stipulated defendant heard, understood, and waived the rights.

Defendant said in the interview that he picked up his wife at 5:00 p.m. in downtown Los Angeles. He explained that he went to the gym with his wife, who paid her expired membership fee. They left the gym at 8:30 or 9:00 p.m., getting into defendant's van. As they began to drive off, two Black men armed with guns got into their van, one through his wife's door and one through his door. Defendant was thrown in the back of the van while one of the men drove. Defendant was told he would be killed if he moved. He heard his wife screaming but could not do anything.

Defendant said that after more than an hour, the van stopped and the men took off running with defendant's money. Defendant tried to drive after them but eventually lost sight of the men. Defendant then saw that his wife was lying naked in the van. Scared, confused, and unsure of what to do, defendant told the investigating officers that he drove the van toward the mountains. He pulled the van to the side of the road and dumped his wife's body over the edge. In his confusion, defendant drove off but crashed the van into a rock. He was not hurt but the paramedics took him to the hospital.

Once defendant returned home, he said that he tried to explain to his daughter what had happened. He told his daughter it would be better if they went to the police. He went to the police station and later agreed to take the police to his wife's body.

Defendant remembered that he had been read his rights at the other station before being questioned. He was again read his Miranda rights, which he understood and defendant proceeded to talk about what happened.

Defendant told the investigators that he had separated from his wife on January 16, 2004, when he returned from El Salvador, but they still saw each other. The investigators told defendant his story was hard to believe

and they accused him of going to the police station only because the crash of his van in the area of his wife's body had been documented. After being urged to tell the truth, defendant said, "There needs to be a lawyer. "When asked if he wanted to talk, defendant asked if they were going to give him the death penalty. He was told they need to hear his story first.

Defendant asked for forgiveness and agreed to tell the truth. He said he loved his wife with all his heart, but she abandoned him. Defendant asked to be put to death before a firing squad.

Defendant said that when he went to El Salvador, a married man named Peter began to court his wife and had sexual relations with her. She left their house, taking everything, and leaving him without any money. He tried to win her back, but she said it was too late. He was humiliated by her. His wife eventually told defendant not to bother her anymore. She told him about her sexual relations with Peter, and defendant lost his mind, strangled her with a rope, and undressed her. She told him to kill her, but he should not have done as she said.

Gabriela called Sergeant Laren on March 16. She was afraid that defendant might be released from custody and gain access to the keys to her apartment, which had been in her mother's purse. Gabriela did not want defendant to come to her apartment because she feared he would kill her, her husband, and Peter.

An autopsy determined that asphyxia due to ligature strangulation was the cause of Gabrielle's death. Gabrielle had a red ligature mark encircling her neck, with a larger mark at the back of her neck. She had hemorrhaging consistent with strangulation. One can lose consciousness in 7 to 12 seconds by constriction of the neck and irreversible brain damage occurs in

about 7 to 12 minutes. The rope recovered from defendant's van was consistent with the instrumentality used to cause death.

(LD 4 at 2-7 (footnotes omitted).)

III.

STANDARD OF REVIEW

A federal court may not grant a petition for writ of habeas corpus by a person in state custody with respect to any claim that was adjudicated on the merits in state court unless it (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Woodford v. Visciotti*, 537 U.S. 19, 21, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam).

"'[C]learly established Federal law' . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court rendered its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). A state court's decision is "contrary to" clearly established Federal law if (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002). A state court's decision cannot be contrary to clearly established Federal law if there is a "lack of holdings from" the Supreme Court on a particular issue. *Carey v. Musladin*, 127 S. Ct. 649, 654, 166 L. Ed. 2d 482 (2006).

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle

was announced." *Lockyer*, 538 U.S. at 76; *see also Woodford*, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle . . . to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." *Wiggins v. Smith*, 539 U.S. 510, 520-21, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" *Id.* (citation omitted); *see also Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir.), *cert. denied*, 540 U.S. 968 (2003).

"[S]tate court factual findings are presumed correct in the absence of clear and convincing evidence to the contrary." *Mitleider v. Hall*, 391 F.3d 1039, 1046 (9th Cir. 2004); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) ("Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).").

In applying these standards, this Court looks to the last reasoned State court decision. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006). To the extent no such reasoned opinion exists, as when a state court rejected a claim in an unreasoned order, this Court must conduct an independent review to

determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). If the state court declined to decide a federal constitutional claim on the merits, this Court must consider that claim under a *de novo* standard of review rather than the more deferential "independent review" of unexplained decisions on the merits authorized by *Delgado*. *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004) (standard of *de novo* review applicable to claim state court did not reach on the merits).

IV.

DISCUSSION

A. GROUNDS ONE, TWO, THREE, AND FIVE: Instructional Error

"The only question . . . is 'whether [a jury] instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (quoting from *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)). "[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional right]." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). "[W]e 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Estelle*, 502 U.S. at 72-73 (quoting from *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)). Here, with respect to Grounds One, Three, and Five, Petitioner's "burden is especially heavy" because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977).

The California Court of Appeal decision, which is the last reasoned decision under *Davis*, addressed all four grounds.

1. Ground One - Denial of Instructions on Series of Events and Burden of Proof

Ground One has two subclaims. In the first, Petitioner argues that the trial court improperly denied a defense request for an instruction that an "act in the heat of passion could be 'a result of a series of events which occur over a considerable period of time.'" (Reply at 11.) If the jury had found that Petitioner had killed his wife in the heat of passion, it would reduce the crime from murder to manslaughter. (*Id.*) In Subclaim Two, Petitioner contends that the trial court improperly denied a defense request for instructions regarding reasonable doubt. (*Id.* at 13-15.)

a. Subclaim One - Series of Events

In CALJIC No. 8.42, the jury was instructed how murder may be reduced to manslaughter. (LD 8 at 424-25.) This sentence is found in the middle of the instruction: "Legally adequate provocation may occur in a short, or over a considerable, period of time." (*Id.* at 424; LD 9 at 2161.) Petitioner, who wanted to highlight his theory of the case that he was provoked over time, believed the sentence was insufficient. (*See* LD 4 at 13.) Petitioner requested that 8.42 be modified to replace the sentence with the following:

> A defendant may act in the heat of passion at the time of killing as a result of a series of events which occur over a reasonable period of time. [¶] Where the provocation extends for a long period of time, take such period of time into account in deciding whether there was a sufficient cooling period for the passion to subside. [¶] The burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in the heat of passion.

(*Id.* at 375.) The trial court refused the request. (*Id.*) The California Court of Appeal concluded that under California law CALJIC No. 8.42, as given, "accurately stated the law and no further instruction was required." (LD 4 at 13.)

Petitioner's claim is flawed for two reasons. First, Petitioner's interpretation of 8.42 is inaccurate. He argues that "the manslaughter instructions given did speak to the fact the jurors could find provocation that took place over either a short or considerable period of time, but they did not deal with the critical matter that the act in the heat of passion could be 'a result of a series of events which occur over a considerable period of time.'" (Reply at 11.) However, the instruction states that murder will be reduced to manslaughter "upon the ground of . . . heat of passion." (LD 8 at 424.) It is clear from the first paragraph of the instruction that the "heat of passion" is the result of the "provocation." (LD 3 at 3.) Thus, when the instruction states that the "provocation may occur in a short, or over a considerable, period of time," it is stating the same thing that Petitioner says it should, that the "heat of passion" may be "a result of a series of events which occur over a considerable period of time." (Reply at 11.)

Second, although Petitioner takes issue with the California Court of Appeal's conclusion, he does not argue that the omission "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (citation omitted). Petitioner's arguments rely only on state law, and a claim grounded in state law is not cognizable in a federal habeas action. *See Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1989) ("A federal court may not issue the writ on the basis of a perceived error of state law.").

Petitioner's subclaim fails.

b. Subclaim Two - Burden of Proof

The trial court instructed the jury on reasonable doubt (CALJIC No. 2.90):

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. The presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined

> as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(LD 8 at 414; LD 9 at 2155-56.)

It is not clear from the petition or the reply which additional instructions Petitioner believes should have been given. (Petition at 5; Reply at 13-15.) Petitioner appears to argue that the instruction, as given, was insufficient and that jurors could have been confused and believed that reasonable doubt was "'something more' than 'mere possible doubt,'" thereby convicting him using "a far lower standard." (Reply at 13.) Thus, the defense, while not "attack[ing]" the instruction or the definition of reasonable doubt, wanted more specificity given to the jury. (*Id.* at 14.) Contrary to Petitioner's assertion, CALJIC No. 2.90 not only states that the standard of proof is higher than "a mere possible doubt," but also defines that higher standard as the lack of "an abiding conviction of the truth of the charge." (LD 8 at 414; LD 9 at 2156.) Thus, the instruction does not permit the jury to convict at "a far lower standard," as Petitioner maintains. (Reply at 13.)

The California Court of Appeal noted that the adequacy of CALJIC No. 2.90 has been confirmed by every California appellate district and by the Ninth Circuit. (LD 4 at 16 (citing to *People v. Hearon*, 72 Cal. App. 4th 1285, 1286-87, 85 Cal. Rptr. 2d 424 (1999)[2].) In *Lisenbeee v. Henry*, 166 F.3d 997, 999 (9th Cir.), *cert.*

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[2] *Hearon* concisely stated that the contention that CALJIC No. 290 is "defective in that it gave the jury no guidance as to the level of certainty to which it must be persuaded before it could reliably determine that the prosecution has met its burden of proof beyond a reasonable doubt" "has no merit." *Id.* at 1286. It instructed appellate attorneys "to take this frivolous contention off their menus." *Id.* at 1287. With that backdrop, Petitioner's contention that *Hearon* "was not

denied, 528 U.S. 829 (1999), the Ninth Circuit explained that *Victor v. Nebraska*, 511 U.S. 1, 14, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) "expressly condoned the use of a jury instruction that uses the term 'abiding conviction' to define the reasonable doubt standard."

Petitioner's subclaim fails.

2. Ground Two - Voluntary Manslaughter Instruction and Intent to Kill

Petitioner argues that the trial court erred in instructing the jury that voluntary manslaughter requires an intent to kill. (Petition at 5; LD 4 at 17; LD 8 at 423.) On direct appeal, the California Attorney General conceded that the instruction was an erroneous statement of California law.[3] (LD 4 at 17.)

The Court of Appeal found that the error was harmless for the following reasons. First, the jury was instructed on the differences between murder and manslaughter. (LD 4 at 18-19.) Second, the prosecutor argued that murder

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trying to cut off all efforts at discussion and improvement" is disingenuous at best. (Reply at 14.) It is also irrelevant as the issue is whether the instruction is legally adequate, not whether it may be "improved."

[3] The only issue, therefore, on direct appeal was whether to apply the federal harmless error test set forth in *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) or the California test outlined in *People v. Watson*, 46 Cal. 2d 818, 836 (1956), *cert. denied sub nom. Watson v. Teets*, 355 U.S. 846 (1957). (LD 4 at 17.) *Chapman* held that an error is harmless unless "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. at 23. *Watson* held that the conviction will be reversed "only if after an examination of the entire cause, including the evidence, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred." 46 Cal. 2d at 836 (internal citations and quotation marks omitted). The Court of Appeal concluded that the correct standard under California law was *Watson*. (LD 4 at 18.)

Generally, the harmless error standard on federal collateral review is set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1170, 123 L. Ed. 2d 353 (1993): whether the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638 (citation and internal quotation marks omitted). The *Watson* and *Brecht* standards are "equivalent." *Bains v. Cambra*, 204 F.3d 964, 971 n.2 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000). However, the Court notes that the collateral review standard for instructional error, as articulated at the outset of these grounds, is a far more stringent one, "'whether [a jury] instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72.

required malice, but manslaughter did not. (*Id.* at 19.) Third, defense counsel argued that the killing was committed in the heat of passion. (*Id.*) Fourth, neither side argued that a manslaughter verdict was impossible. (*Id.*) Finally, the evidence "strongly suggests an intent to kill." (*Id.*) Petitioner strangled Gabrielle, which the coroner testified "could take up to 12 minutes" to accomplish. Petitioner left threatening messages on Gabrielle's answering machine the week before the killing. Petitioner's post-crime conduct was consistent with an intentional killing as he stripped the body to prevent identification, dumped the body off the side of the road, failed to report the killing to the police, and concocted an elaborate lie about what happened. (*Id.* at 19-20.)

The Court of Appeal's decision was not an objectively unreasonable application of the harmless error standard. *See Mitchell v. Esparza*, 540 U.S. 12, 18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003). Petitioner presents no evidence to contradict the conclusions of the Court of Appeal.[4] Instead, he sets forth only generalized legal arguments. (Reply at 17-19.) His one factual argument is that in his confession he never said he intended to kill his wife, just that he "lost it." (Reply at 19-20.) Petitioner's confession is only one piece of evidence; the jury is entitled to interpret the evidence as it sees fit and draw inferences from all of the evidence. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979).

Petitioner's claim fails.

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[4] Petitioner contends that because the jurors rejected first-degree murder, "they [also] rejected intent to kill." However, the definition of second-degree murder also includes an intent requirement. (LD 8 at 421.) In fact, because the jury was instructed that both second-degree murder and manslaughter required an intent to kill, the key difference between the two crimes, from the jury's perspective, was that manslaughter involved a killing in the heat of the passion. Thus, it is unlikely that the jury rejected manslaughter because of the erroneous instruction on manslaughter. Instead, it is far more probable that the jury rejected the defense theory that Petitioner killed his wife in the heat of passion.

3. Ground Three - Failure to Instruct on Confession

Petitioner argues that the trial court erred in failing to instruct the jury that his out-of-court admissions should be viewed with caution. (Petition at 6; LD 4 at 24.) The Court of Appeal agreed that a cautionary instruction should have been given.[5] (LD 4 at 25.) According to the Court of Appeal, Petitioner objected to five admissions:[6] (1) he had a phone conversation with his daughter on the night of the murder in which he said he had dropped off his wife; (2) near the end of January, Petitioner asked his daughter if his wife was going to come back to him; (3) the daughter told the police she heard Petitioner leaving threatening messages on her answering machine the week before the murder; (4) the daughter told the police that Petitioner called her a "parasite," said he hated her, and threatened to call the police when she told him she was going to file a police report; and (5) the daughter told the police that Petitioner asked her, "Do you want me to kill you, kill your sister, and kill your mom and myself, too?" (LD 4 at 25.)

The California Court of Appeal found the error harmless for the following reasons. First, the trial court instructed the jury (CALJIC No. 2.27) "on the sufficiency of the testimony of one witness" (*id.* at 26.):

> You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for proof of that fact. You should

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[5] The standard instruction is CALJIC No. 2.70, which states "Evidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution." (LD 4 at 24-25.)

[6] In his petition, Petitioner does not set forth which out-of-court admissions were problematic. (Petition at 6.) Additionally, his allegations on this point in the reply are unclear. (Reply at 27.)

carefully review all the evidence upon which the proof of that fact depends.

(LD 8 at 402; LD 9 at 2150-51.)

Second, the jury heard not only the daughter's testimony about the statements, but also Petitioner's denials that he made the statements. (LD 4 at 26.)

Just as in the other grounds of instructional error, Petitioner fails to analyze the issue under the correct, federal standard.[7] He never claims that the failure to instruct "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (citation omitted). Nor does he address the heavy burden of an omitted instruction, which "is less likely to be prejudicial." *Henderson*, 431 U.S. at 155. Petitioner's arguments rely only on state law, and a claim grounded in state law is not cognizable in a federal habeas action. *See Pulley*, 465 U.S. at 41.

Petitioner's claim fails.

4. Ground Five - Involuntary Manslaughter

There is no clearly established Supreme Court law that requires giving a lesser included offense instruction in noncapital cases. In *Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995), *cert. denied*, 522 U.S. 1153 (1998), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999), the court noted that pursuant to *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), "failure to instruct on a lesser included offense in a *capital* case would be constitutional error if there were evidence to support the instruction." *Turner*, 63 F.3d at 818-19 (emphasis in original). However, "[t]here is no settled rule of law on whether *Beck* applies to noncapital cases." *Id.* at 819. The Ninth Circuit

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[7] Petitioner appears to argue that the testimony itself was inadmissible. (Reply at 27 ("Petitioner cannot agree the sole issue here was whether the statements were made.").) However, Petitioner has no legal support for such an argument, nor did he make the argument in California.

has not specifically addressed the issue of whether to extend *Beck* but "has declined to find constitutional error arising from the failure to instruct on a lesser included offense in a noncapital case." *Id.* (citing to *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984); *see also Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998) ("Under the law of this circuit, the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question") (citation omitted).

According to *Turner*, there is an intercircuit split on the issue. *Turner*, 63 F.3d at 819. The Tenth and Eleventh Circuits have found no constitutional right in noncapital cases, whereas the Third and Sixth Circuits have extended *Beck* to noncapital cases; and the First and Seventh Circuits have applied *Beck* only "to prevent a 'fundamental miscarriage of justice.'" *Id.* Finally, *Turner* held that "any finding of constitutional error would create a new rule, inapplicable to the present case under *Teague*." *Id.*

This Court may not grant relief on a "claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). Such "clearly established" Supreme Court precedent is absent. *See Keeble v. United States*, 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) (The Supreme Court has "never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense"). "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from the Supreme Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per curiam). Thus, "[a]lthough lower federal court and state court precedent may be relevant when that precedent illuminates the

application of clearly established federal law as determined by the United States Supreme Court, if it does not do so, it is of no moment." *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005).

Even if this ground presented a federal question, the California Court of Appeal's decision was not unreasonable. It found that there was "no substantial evidence . . . to support a finding of involuntary manslaughter" and, therefore, no basis on which to give such the instruction. (LD 4 at 21.) Under California law, to instruct on involuntary manslaughter, there must be substantial evidence that "the defendant killed in the commission of an unlawful act, not amounting to a felony, or killed in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*Id.*) As the state court explained, "[t]he violation strangulation of another person is not misdemeanor conduct. Strangulation is not a lawful act which might produce death in an unlawful manner. Nor can strangulation be characterized as a mere act done without due caution and circumspection." (*Id.*)

Petitioner's claim fails.

B. GROUND FOUR: *Miranda*

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." "[A] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and . . . the police must explain this right to him before questioning begins." *Davis v. United States*, 512 U.S. 452, 457, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (citing *Miranda*, 384 U.S. at 469-73)). "[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation."

Davis, 512 U.S. at 458 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). Law enforcement officers "must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." *Davis*, 512 U.S. at 454 (citation omitted).

The test of whether a suspect has "clearly asserted his right" to counsel is "objective." *Id.* at 459. "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," cessation of questioning is not required. *Id.* (emphasis in original). The "*likelihood* that a suspect would wish counsel to be present is not the test." *Id.* (citation and internal quotation marks omitted) (emphasis in original). "Nothing in *Edwards* requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer." *Id.* at 460. Although the police may choose to clarify an ambiguous request, such clarification is not required. *Id.* at 461.

On February 24, 2004, beginning at about 9:00 p.m., Sergeant Shannon Laren, the investigating officer, and Sergeant Shaun McCarthy interviewed Petitioner at the police station. (LD 9 at 682, 715; LD 7.) The interview was videotaped and a Spanish-speaking sheriff (Guerrero) was present and translating. (LD 9 at 715, 720-21.) The tape was played for the jury without objection. (*Id.* at 910.) The following day, defense counsel asked for a mistrial based on Petitioner's references to an attorney toward the end of the interview.[8] (*Id.* at 1270.) Subsequently, the defense renewed its request for a mistrial. (*Id.* at 1814-15.) The trial court denied the request (*id.* at 1817), finding: (1) Guerrero waited a few seconds after Petitioner's first statement in Spanish (translated into

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[8] After these references to an attorney, Petitioner "admitted strangling Gabrielle and disposing of her body." (LD 4 at 28-29.) Earlier in the interview, Petitioner fabricated a story about two Black males killing his wife. (LD 7.)

English as "there needs to be a lawyer") and then says "what"; (2) Petitioner repeated the statement but not as loudly as the first time;[9] (3) Guerrero asked Petitioner, "do you want to talk?"; (4) Petitioner responded with a question about whether he was going to get the death penalty; and (5) at the same time as Petitioner asks the question about the death penalty, Guerrero started to tell the other sheriffs "he's asking about . . .". (*Id.* at 1817-18.) The trial court found that Petitioner's two statements about a lawyer were not clear and unambiguous requests for counsel and that his statements were inconsistent with his "level of cooperation." (*Id.* at 1818-19.)

The California Court of Appeal decision, which is the last reasoned decision under *Davis*, concluded that Petitioner's two identical statements ("there needs to be a lawyer") were "ambiguous reference[s] to counsel" and therefore insufficient to require the cessation of questioning. (LD 4 at 29.) The court reasoned that the references were "manifestly unclear. Nothing in the context of the statement articulated 'his desire to have counsel present sufficiently clearly that a reasonable peace officer in the circumstances would understand the statement to be a request for an attorney.'" (*Id.* at 30 (quoting *Davis*, 512 U.S. at 459).)

Petitioner argues that the statement "there needs to be a lawyer" is not a "conditional statement." (Reply at 5.) It was repeated. (*Id.* at 5-6.) Additionally,

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[9] This Court has reviewed the tape. At about one hour, forty minutes into the interview, Petitioner said "Tiene que estar un abrogado." (LD 7.) Petitioner agrees that the statement, in English, means "There needs to be a lawyer." (Petition, Ground Four Supporting Facts at 2.) Based on his inflection, he did not state it as a question. It was as if he were saying it to himself. Guerrero did not translate the statement into English for the other two deputies. (LD 7.) Guerrero then said "Como?" which means "What?" (*Id.*) Petitioner repeated the same statement, but much more softly than the first time. (*Id.*) Again, Guerrero did not translate the repetition into English. (*Id.*) At that point, she leaned over toward the other two deputies and said something that was not audible on the tape. (*Id.*) Guerrero then asked Petitioner in Spanish whether he wanted to talk. (*Id.*) Petitioner asked whether they were going to give him the death penalty, which Guerrero translated into English. (*Id.*)

the statements were made after great pressure was brought to bear on him by the police. (*Id.* at 7-8.) Petitioner's arguments are unavailing. First, although Petitioner's statements were not conditional, they were made in the passive voice, which is less clear than had they been made in the active voice. As Petitioner himself correctly points out, the statement "I think I need a lawyer before I say anything else" in *Davis* was sufficiently clear to halt the questioning. (*Id.*) As for the alleged pressure by the police leading up to Petitioner's statements, Petitioner cites no authority that says that such pressure, assuming it existed, is relevant to the question of requesting counsel.

The California Court of appeal decision was not an unreasonable application of Supreme Court law, nor an unreasonable determination of the facts in light of the record before it.[10] In *Paulino v. Castro*, 371 F.3d 1083, 1087 (9th Cir. 2004), Paulino had asked the police, "Where's the attorney?" and "You mean it's gonna take him long to come?" The Ninth Circuit held that "under the constraints of the current habeas statute, we cannot say that the state court of appeal was objectively unreasonable in its conclusion that Paulino failed to unambiguously request counsel." *Id.* at 1088 (citing to *Clark v. Murphy*, 331 F.3d

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[10] The Court also notes that a *Miranda* error is assessed "in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). In the habeas context, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. *See Brecht*, 507 U.S. at 637; *Beatty v. Stewart*, 303 F.3d at 975, 994 (2002). A court must keep in mind that "a confession is like no other evidence," and that "a full confession may have a 'profound impact' on the jury." *Fulminante*, 499 U.S. at 296 (citation and internal quotation marks omitted).

Even assuming Petitioner's confession were improperly admitted, it was harmless under this standard. In his taped confession, Petitioner admitted he killed his wife by grabbing a rope and strangling her. (LD 8 at 340.) In his trial testimony, Petitioner also admitted he killed his wife by tying a rope around her neck and strangling her. (LD 9 at 1891.) In his confession and at trial, Petitioner said his wife was having sexual relations with another man. (LD 8 at 329-30; LD 9 at 1890.) In other words, the jury heard Petitioner confess twice, once on tape and again at trial. Any possible error in admitting the taped statements made after Petitioner's references to an attorney was harmless.

1062, 1070 (9th Cir. 2003) (state-court decision that the statement "I think I would like to talk to a lawyer" was equivocal was not unreasonable)).

Likewise, here, this Court cannot say that the Court of Appeal's decision was unreasonable. "Where's the attorney" and "There needs to be a lawyer" are similar in their lack of clarity and focus. Petitioner initiated further conversation when he asked about the death penalty, which indicated a willingness to speak and negated any purported request for counsel he had made. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

Petitioner's claim fails.[11]

C. GROUND SIX: Prosecutorial Misconduct

In a claim of improper prosecutorial argument, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). "Attorneys are given wide latitude during closing arguments." *Fields v. Brown*, 431 F.3d 1186, 1206 (9th Cir. 2005) (citation omitted). "[P]rosecutorial misrepresentations . . . are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." *Boyde v. California*, 494 U.S. 370, 385-85, 110 S. Ct. 1190 (1990) (citations omitted).

At Petitioner's trial, the prosecutor argued in closing as follows:

> Murder can be reduced to manslaughter by sudden quarrel, heat of passion. [¶] What's important, what the law requires is that there

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[11] Petitioner's claim of ineffective assistance is conditional. (Petition, Ground Four Supporting Facts at 3 ("However, if waiver or forfeiture were an issue, counsel's ineffective representation would also come into question and raised briefly as an alternative argument for reversal.").) The Court need not address the ineffective assistance claim as neither the Court of Appeal nor this Court found that Petitioner had waived the *Miranda* argument. (LD 4 at 28.)

> must be provocation. This provocation must be of the type that excite and arouse passion and that the defendant acted under that influence. It must be the type of passion that would be naturally aroused in the ordinarily reasonable person in the same set of circumstances. [¶] Again, the law goes back to reasonableness. All 12 of you must agree that it would be reasonable for the defendant to act this way.

(LD 9 at 2194-95.) Defense counsel objected that the prosecutor had misstated the law. (*Id.* at 2195.) He said the prosecutor had argued that "the act has to be reasonable." (*Id.*) The trial court, implicitly overruling the objection, responded that "the law requires . . . that a reasonably prudent person would be so aroused that he would take some more action." (*Id.* at 2195-96.) The prosecutor resumed her argument.

The California Court of Appeal agreed with Petitioner's argument "that the law of heat of passion does not require the jury to find that the killing of another human being was reasonable." (LD 4 at 23.) However, the court disagreed that the prosecutor had misstated the law: "In context, the prosecutor argued that the provocation must have been sufficient to arouse the passions of a reasonable person." (*Id.* at 24.) Moreover, even if the jury had misconstrued the prosecutor's comments, any error was harmless. (*Id.*) The jury had been properly instructed on voluntary manslaughter based on heat of passion, and they had also been instructed that the judge's instructions trumped the parties' argument. (*Id.*)

The Court of Appeal's decision was reasonable. Its interpretation of the prosecutor's argument is plausible. As the court pointed out, the prosecutor's assertion that all of the jurors had to "agree that it would be reasonable for the defendant to act this way" could not be construed to mean that manslaughter required reasonableness, particularly in the context of her earlier statement about

the reasonability test for heat of passion. In addition, the court's conclusion that any possible error was harmless was also reasonable as the jury had been properly instructed on heat of passion. *See Boyde*, 494 U.S. at 385 ("the arguments of counsel . . . must be judged in the context in which they are made"). Moreover, the prosecutor's continued argument was a correct statement of the law:

> So what the law requires, that the provocation must be the type to excite and arouse the passion and that the defendant, when aroused, acted under that. [¶] The passion must be naturally aroused and in an ordinarily reasonable person and in the same circumstances. So what that means is that the passion must be such a passion that would be aroused in the mind of an ordinary reasonable person. Again, the law goes back to what an ordinary reasonable person would do.[12] [¶] The defendant, it's very important, the defendant is not permitted to set up his own standard of conduct to justify what he does. The defendant can't say, "Well, I was passionate, and I acted under that passion." He cannot set up his own standard of conduct. That is not the law.

(LD 9 at 2196-97.)

Petitioner has not shown that "the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (citation and internal quotation marks omitted). His claim fails.

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[12] Based on this sentence, Petitioner implies that the prosecutor has again misstated the law. (Reply at 24.) It is quite clear from the prosecutor's comments that her sole objective was to ensure that the jury realized that the heat of passion test was not a subjective one from Petitioner's perspective, but an objective one from the perspective of a reasonable person.

V.

RECOMMENDATION

For the reasons discussed above, it is recommended that the District Court issue an Order (1) adopting this Report and Recommendation and (2) directing that judgment be entered denying the petition and dismissing this action with prejudice.[13]

DATED: December 18, 2007

Alicia G. Rosenberg
ALICIA G. ROSENBERG
United States Magistrate Judge

[13] Although Petitioner requests an evidentiary hearing, he does not identify any factual allegations in dispute. There are no factual allegations that, if true, would entitle Petitioner to federal habeas relief. No evidentiary hearing is necessary. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940, 167 L. Ed. 2d 836 (2007).

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.